Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)–32 OF 2008(S)
ZAKI AZMI CHIEF JUSTICE, HASHIM YUSOFF AND MOHD GHAZALI FCJJ
7 SEPTEMBER 2009

Civil Procedure — Pleadings — Findings on matters not pleaded — Parties pursuing and defending action based on breach of contract — Frustration not asserted in pleadings, argued at trial or raised on appeal — Whether open to appellate court to find contract between parties had been frustrated

Civil Procedure — Trial — Role of judge — Adversarial nature of legal system — Whether open to trial judge to decide how litigant should plead and pursue its case — Whether open to trial judge to decide issue without reliance on pleadings or submissions — Relevant issues to a case not raised by either party, duty of judge how exercised

Contract — Construction of terms of contract — Intention of parties — Contract clearly expressed intention of parties — Term in contract prescribed how purchase price reckoned — Parties disagreeing over interpretation of such term — Whether contract frustrated due to difficulty in interpreting such term — Whether court free to adopt own method to interpret such term

Contract — Frustration — Correct test for frustration — Difficulty of performance vs impossibility of performance — Whether contract frustrated when subsequent change in circumstances rendered performance of contract legally or physically impossible — Whether difficulty in interpreting contractual term a ground for frustration

The appellants ('defendants') referred two questions to the Federal Court for determination. First, whether it was open to an appellate court to find that a contract had been frustrated, notwithstanding the fact that frustration had not been pleaded, argued at trial or raised as a ground of appeal in the appellate court. Second, whether the doctrine of frustration recognised the failure of the parties to a concluded sale and purchase contract, to agree on the purchase price when the contract provided for such price to be reckoned in a manner 'consistent with the prevailing market price'.

Held, allowing the defendants' appeal with costs here and below:

(1) The word 'frustrated' used by the Court of Appeal in its judgment was not intended to be used in a colloquial manner. The Court of Appeal had intended to use the word 'frustrated' to mean 'frustration' under ss 57(2) and 33 of the Contracts Act 1950 (see paras 10–11).

(2) The statement made by the Court of Appeal to the effect that the parties' disagreement on the fundamental term concerning price and the lack of any provision to settle the disagreement, constituted a wrong statement of law (see para 12).

(3) In the instance case, frustration was never pleaded or argued in the High Court or Court of Appeal. The nature of the Malaysian legal system is adversarial. The successful party in a civil claim is the one who is able to prove his case to the court on a balance of probabilities. It is not for the court to decide upon what principle a party should plead his case. It is for that party to identify it himself (see paras 13–15); *Tan Kong Min v Malaysia National Insurance Sdn Bhd* [2006] 1 MLJ 601 referred; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin* [1995] 2 MLJ 213 referred; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 referred.

(4) The court decides a case after considering the evidence adduced by each party and the documents produced by them. Neither party should be taken by surprise. Whether at first instance or at appellate level, judges rely heavily on submissions and authorities submitted by counsel. Counsel, as a matter of professional etiquette, is supposed to bring to the court's attention authorities that even favour his opponent's case, though he may proceed to distinguish his case from such authorities. It is dangerous and not advisable for the court, on its own accord, to consider a point without reliance on any pleadings or submissions by counsel. If a judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight those points to the parties before him. He must then give an opportunity for both parties to further submit on those particular points. Where a judge makes a decision on an issue that is not based on the pleadings and without hearing the parties on that issue, the judge would then be in breach of the legal maxim *audi alteram partem* (see paras 16–17); *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 referred.

(5) In the instant case, the case was pleaded on a breach of contract. There was nothing in the pleadings related to frustration. The parties had not pleaded frustration. Neither had they submitted that the contract had been frustrated. The Federal Court would thus answer the first question posed in the negative (see paras 18–20).

(6) A contract does not become frustrated merely because it becomes difficult to perform. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract is entered into. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed. There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for (see paras 22–23); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 referred; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 followed; *Ramli bin Zakaria v Government of Malaysia* [1982] 2 MLJ 257 referred; *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256 referred.

(7) Where there is some machinery or a guideline to which the parties have agreed to, and there is difficulty in arriving to the agreed terms, the court can apply any method in interpreting and substitute its own machinery. The court is under obligation to interpret a contract according to what is pleaded. Parties are under a duty to assist the court. In the instant case, the parties had provided for a mechanism to determine the price, that is 'a price consistent with the prevailing market price'. The Court of Appeal was therefore wrong in holding that the difficulty in interpreting the terms of the agreement amounted to frustration. The agreement clearly expressed the intention of the parties to determine the price according to 'a price consistent with the prevailing market price'. The agreement was not frustrated as there was no impossibility of interpreting their intentions. The second question should therefore be answered in the negative (see paras 26–28); *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444 followed.

[Bahasa Malaysia summary

Perayu-perayu ('defendan-defendan') merujuk dua persoalan ke Mahkamah Persekutuan untuk suatu penentuan. Persoalan pertama, sama ada mahkamah rayuan boleh menentukan bahawa suatu kontrak telah dikecewakan, meskipun fakta bahawa kekecewaan itu tidak diplid, dihujahkan semasa perbicaraan atau dibangkitkan sebagai alasan rayuan di mahkamah rayuan. Persoalan kedua, sama ada doktrin kekecewaan memperakui kegagalan pihak-pihak untuk menyempurnakan kontrak jual beli, untuk menyetujui harga belian apabila kontrak tersebut menyatakan harganya perlu dihitung dalam cara '*consistent with the prevailing market price*'.

Diputuskan, membenarkan rayuan defendan-defendan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Perkataan '*frustrated*' yang digunakan oleh Mahkamah Rayuan dalam

penghakimannya tidak bermaksud digunakan secara biasa-biasa sahaja. Mahkamah Rayuan berniat menggunakan perkataan '*frustrated*' untuk bermaksud '*frustration*' di bawah ss 57(2) dan 33 Akta Kontrak 1950 (lihat perenggan 10–11).

(2) Pernyataan yang dibuat oleh Mahkamah Rayuan yang membawa maksud bahawa ketidakpersetujuan pihak-pihak atas terma-terma asas berkaitan harga dan juga ketiadaan sebarang peruntukan bagi menyelesaikan petikaian itu, merupakan pernyataan undang-undang yang salah (lihat perenggan 12).

(3) Dalam kes ini, kekecewaan tidak pernah diplid atau dihujahkan di Mahkamah Tinggi mahupun di Mahkamah Rayuan. Sistem perundangan di Malaysia bersifat menentang. Pihak yang berjaya dalam tuntutan sivil adalah pihak yang berjaya membuktikan kesnya di mahkamah pada imbangan kebarangkalian. Bukan untuk mahkamah memutuskan atas prinsip apakah pihak-pihak harus memplidkan kesnya. Pihak itu sendiri yang harus menentukannya (lihat perenggan 13–15); *Tan Kong Min v Malaysia National Insurance Sdn Bhd* [2006] 1 MLJ 601 dirujuk; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin* [1995] 2 MLJ 213 dirujuk; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 dirujuk.

(4) Mahkamah memutuskan sesuatu kes setelah mempertimbangkan keterangan yang dikemukakan oleh pihak-pihak dan dokumen-dokumen yang diutarakan oleh mereka. Pihak-pihak tidak harus dikejutkan. Sama ada di peringkat pertama atau di peringkat rayuan, hakim-hakim bergantung sepenuhnya atas penghujahan dan autoriti-autoriti yang diserahkan oleh peguam. Atas dasar etika profesion, peguam sepatutnya membawa perhatian mahkamah kepada autoriti-autoriti yang walaupun memihak kepada pihak penentang, sungguhpun dia boleh meneruskan untuk membezakan kesnya daripada autoriti-autoriti tersebut. Adalah bahaya dan tidak dinasihatkan untuk mahkamah, dengan sendirinya, mempertimbangkan suatu perkara tanpa merujuk kepada mana-mana pliding atau penghujahan peguam. Jika seorang hakim berpendapat bahawa adanya perkara-perkara yang relevan kepada kes di hadapannya dan tidak dibangkitkan oleh pihak-pihak, menjadi kewajipannya untuk menekankan perkara itu kepada pihak-pihak tersebut. Beliau kemudiannya haruslah memberi ruang kepada pihak-pihak untuk mengemukakan perkara tersebut. Apabila seseorang hakim membuat keputusan atas suatu isu tidak berpandukan kepada pliding-pliding dan tanpa mendengar pihak-pihak berhujah akan isu tersebut, hakim itu telah melanggar maksim perundangan *audi alteram partem* (lihat perenggan 16–17); *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 dirujuk.

(5) Kes ini diplidkan atas kemungkiran kontrak. Tiadapun dalam pliding tersebut yang berkait dengan kekecewaan. Pihak-pihak tidak memplidkan kekecewaan. Maka, Mahkamah Persekutuan menjawab persoalan pertama dengan negatif (lihat perenggan 18–20).

(6) Suatu kontrak tidak terkecewa semata-mata kerana menjadi susah untuk dilaksanakan. Doktrin kekecewaan hanyalah suatu kes khusus untuk menunaikan kontrak dengan pelaksanaan mustahil setelah kontrak itu termeterai. Suatu kontrak terkecewa apabila setelah pembentukannya, suatu perubahan keadaan yang mengakibatkan kontrak tersebut mustahil dilaksanakan secara undang-undang atau fizikal. Perlu ada perubahan penting dalam kewajipan itu yang mana jika perkara yang telah diakujanji, akan, jika dilaksanakan, menjadi perkara yang berbeza dengan apa yang dikontrakkan (lihat perenggan 22–23); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 dirujuk; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 diikut; *Ramli bin Zakaria v Government of Malaysia* [1982] 2 MLJ 257 dirujuk; *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256 dirujuk.

(7) Apabila adanya mekanisma atau garis panduan yang mana pihak-pihak telah bersetuju, dan ada sedikit masalah untuk mencapai persetujuan tersebut, mahkamah boleh mengguna pakai sebarang kaedah dalam mentafsirkan dan menggantikan dengan mekanismenya sendiri. Mahkamah berkewajipan untuk mentafsirkan suatu kontrak menurut apa yang telah diplidkan. Pihak-pihak pula bertanggungjawab membantu mahkamah. Dalam kes ini, pihak-pihak telah memperuntukkan suatu mekanisme untuk menentukan harga, iaitu '*a price consistent with the prevailing market price*'. Mahkamah Rayuan khilaf apabila memutuskan bahawa kesusahan mentafsirkan terma-terma perjanjian tersebut mengakibatkan kekecewaan. Perjanjian tersebut jelas menyatakan niat pihak-pihak untuk menentukan harga menurut '*a price consistent with the prevailing market price*'. Perjanjian tersebut tidak terkecewa kerana tiada kemungkinan untuk mentafsirkan niat mereka. Persoalan kedua seharusnya juga dijawab dengan negatif (lihat perenggan 26–28); *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444 diikut.]

Notes

For a case on correct test for frustration, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3764.

For cases on findings on matters not pleaded, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5411–5414.

For cases on intention of parties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3133–3154.

For cases on role of judge, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7882–7886.

Cases referred to

Davis Contractors Ltd v Fareham UDC [1956] AC 696, HL (folld)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201, CA (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)
Hoecheng Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)
Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154, HL (refd)
Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256, FC (refd)
Ramli bin Zakaria v Government of Malaysia [1982] 2 MLJ 257, FC (refd)
Sudbrook Trading Estate Ltd v Eggleton [1983] AC 444, HL (folld)
Tan Kong Min v Malaysia National Insurance Sdn Bhd [2006] 1 MLJ 601, FC (refd)
Veronica Lee Ha Ling & Ors v Maxisegar 02(i)-27 of 2009 (W) (refd)

Legislation referred to

Contracts Act 1950 ss 33, 57, 57(2)

Porres Royan (Colin Lau and Lim Hock Leng with him) (Lim Guan Sing & Co) for the appellants.
Karpal Singh (Roland Cheng and Henry Chin with him) (Shim & Pang) for the respondents.

Zaki Azmi Chief Justice:

INTRODUCTION

[1] The appellants raised two complaints before us. The first complaint is that the Court of Appeal had considered a matter which were neither pleaded nor argued at any stage of the proceedings be it at the High Court or the Court of Appeal. According to the appellants, the Court of Appeal in considering the judgment from the High Court, delved itself into the issue of frustration, when that question was never raised in the pleadings, in the argument at the High Court, the memorandum of appeal to the Court of Appeal, or in the course of argument at the Court of Appeal. Secondly, following that mistake, the Court of Appeal continued to make what the appellants contend as an obvious and erroneous statement of law as to what is frustration. Hence leave was granted on the following two questions for us to decide:

A QUESTION 1

Whether it is open to an appellate court to find or hold that a contract has been frustrated notwithstanding that such had neither been pleaded nor canvassed in the trial court and neither pleaded as a ground of appeal in the appellate court?

B QUESTION 2

Whether the doctrine of frustration in the law of contracts recognises the failure of the parties to a concluded and valid sale and purchase agreement of a product to agree on the sale and purchase price as a frustrating event when the agreement provides for a price consistent with the prevailing market price of the product?

C

[2] I decided to follow the suggestion by the appellants' counsel that parties to this appeal be referred to in the same manner (by their designation) as at the High Court. The appellants will therefore be referred to as the first and second defendants or defendants respectively, whilst the respondents be referred to as the first and second plaintiffs or plaintiffs respectively.

D

FACTS

E

[3] The first defendant was operating a sawmill and was formerly known as Veramex Sdn Bhd. The plaintiffs were once the directors of the first defendant and together with their two other brothers were shareholders of the first defendant. As on 28 August 1996, the first defendant owed the plaintiffs a sum of RM10,134,000. There is no dispute as to this fact. At that time, the

F plaintiffs together with their two brothers held 6,500,000 shares in the first defendant and by a share sale agreement dated 12 November 1996, the plaintiffs and their two brothers agreed to sell the shares to a purchaser by the name of Liew Ho-Tien. Liew Ho-Tien was described by the first plaintiff as the representative of the second defendant. By a letter dated 12 November

G 1996, the first defendant agreed on the method of settling their RM10,134,000 debt. This was to pay the plaintiffs the amount owed together with interest at the rate of interest of 11%pa calculated on a day to day basis with the following undertakings:

H (a) That the first defendant shall sell and the plaintiffs shall purchase timber products manufactured by the first defendant at a price consistent with the prevailing market price and which, in total, cost the same amount as the outstanding sum plus the agreed interest over a period of ten months and such timber products are to be delivered in

I four shipments.

(b) The cost of the timber products sold shall be deducted from and set off against the outstanding debt and agreed interest.

[4] In short, what the parties agreed was that the debt is to be set off against the supply of the first defendant's timber products to the plaintiffs. The price of timber to be supplied will be at the 'prevailing market price'. If however, the timber products are not supplied according to the agreement, the first defendant undertook to pay cash in lieu of the timber products.

[5] It was conceded by the plaintiffs at p 147 of the record of appeal that the plaintiffs placed only one order for the first defendant's timber products by a sale contract dated 6 November 1997 resulting in the reduction of the amount owing to the plaintiffs. It should be noted that the factory producing the timber products closed down in July 1998.

[6] At the High Court, the plaintiffs' claim was dismissed and on a finding of fact. It was concluded that the plaintiffs' claim was premature. This is how the learned High Court judge concluded his judgment:

> … since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature.

[7] Simply put, the High Court found that the plaintiffs had prematurely filed their claims because it was never shown that the events that could have triggered the payment of cash had arisen.

[8] During the course of trial, there was also a dispute as to the price that was to be fixed for the sale of the timber products by the first defendant to the plaintiffs. We must bear in mind that the price of the timber products that were to be sold by the first defendant to the plaintiffs was at 'a price consistent with the prevailing market price'. This is the term used in the agreement mentioned above. What then is the 'prevailing market price'?

[9] In an attempt to answer the question above, the Court of Appeal concluded that because the parties could not agree as to the 'prevailing market price' at the material time, which, to the Court of Appeal is a fundamental term, then the agreement is frustrated. This is what the Court of Appeal said:

> Out of a total of four attempts to purchase the first respondent's timber products, only one transaction was concluded for the purpose of this set-off. Evidence disclosed that this was due to the failure of the parties to agree on the price. According to the appellants (plaintiffs), the prices quoted by the first respondent (first defendant) were too high. They were inconsistent with those prevailing in the market at the material time. This was the price agreed upon by the parties under exhibit P2. *We are of the view that when the parties disagree on this fundamental term and there is no provision in the agreement to settle this, then the agreement is frustrated.*

A It was not due to a lack of trying or the fault of any one party but just that the contractual obligation has become impossible to perform due to the absence of a mechanism in the agreement to settle this dead lock. When the price cannot be agreed then naturally there can be no purchase of the first respondent's (first defendant) timber products for the purpose of set off. Under such circumstances, s 57(2) of the Contracts Act 1950 (the Act) applies.

B

> Section 57 Agreement to do impossible act
>
> (2) Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

C

Another provision that is applicable here is s 33 of the Act …

D

> Section 33 Enforcement of contracts contingent on an event happening
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.

E

(Emphasis added.)

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[10] Was this statement, in relation to frustration, a statement of law or was the word 'frustrated' used by the Court of Appeal to be read in a just a colloquial way?

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[11] I am of the opinion that the Court of Appeal intended to apply the word 'frustrated' in their judgment above to mean 'frustration' under s 57(2) as well as s 33 of the Contracts Act 1950. To my mind, the learned Court of Appeal judge could not have intended to use that word in a colloquial manner.

H

[12] But it is clear as daylight that the statement the Court of Appeal made when the learned Court of Appeal judge said, 'We are of the view that when the parties disagree on this fundamental term and there is no provision in the agreement to settle this, then the agreement is frustrated' is a wrong statement of law. The reasons for this will be discussed later.

I

[13] More important and related to the first question is the issue of whether the Court of Appeal was right in invoking a principle of law which was never

pleaded or argued at the court below or even before it as a ground for arriving at its decision. 'Frustration' was never pleaded or argued at any stage from the High Court to the Court of Appeal (see *Veronica Lee Ha Ling & Ors v Maxisegar* 02(i)-27 of 2009 (W)).

[14] The nature of our system is adversarial. This means that the judge has to listen to submissions or cases put by each party to an action. He then decides the case based on evidence and submissions put by both parties. In a criminal case, the prosecution has to prove their case beyond reasonable doubt while the defence's burden is merely to raise a doubt. In civil cases however, the burden placed on both parties is equally balanced. The successful party is the one that is able to prove to the court on the balance of probability that his case is more probable. That is on facts. The claimant has to plead his case in the statement of claim while the defendant pleads in his statement of defence. In short, both parties are aware of the other party's case. In fact, both parties would know the facts but also the documents, if any, that are going to be relied upon by his opposite party.

[15] The facts pleaded will inadvertently be related to the legal principles that the party will be relying upon. It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves (see *Tan Kong Min v Malaysia National Insurance Sdn Bhd* [2006] 1 MLJ 601 (FC) at p 614 para [51]; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 (CA) at p 213 para D and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (HC) at p 196 para G).

[16] The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put forward by the respective counsel. A good counsel is one who produces authorities to support the statement of law he is relying upon. The authorities can be in the form of reported judgments, text books or even published law articles. In fact, according to etiquette, he is supposed to even bring to the attention of the court authorities which favour his opponent's case. Of course in such an instance, he would then distinguish the facts of the case before the court to the case in the authority. It is therefore dangerous and totally unadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point (see *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 at pp 407–409). There have

A been instances where a judge may already form some opinion on certain issues, legal or otherwise, but after hearing submissions and views expressed by a party, he may conclude differently.

B **[17]** The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the Latin maxim *audi alteram partem*, which literally means, to hear the other side, a basic principle of natural justice.

C **[18]** In the instant appeal, the case was pleaded on a breach of contract and the first defendant's defence was that the plaintiffs had only ordered one shipment, three shipments short of the terms of the agreement, although the first defendant was ready and willing to supply the timber products. The reply contended otherwise. There was nothing mentioned in the pleadings which could be related to frustration.

D

[19] It is trite that in pleading frustration, particulars which give rise to frustration must be provided specifically in the pleadings (see *Bullen & Leake & Jacob's Precedents of Pleadings* (13th Ed, 1990) London, Sweet & Maxwell at p 1102). The parties in this case had not pleaded or submitted that the contract in question had been frustrated. Thus, the defendants were highly prejudiced when the Court of Appeal decided on the issue of frustration.

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[20] Therefore, the answer to the first question must be in the negative.

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[21] Now, onto the second question. It involves the law of frustration. It was mentioned earlier that the Court of Appeal made a wrong statement of law regarding frustration. I will now explain the reason why.

G **[22]** A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who

H is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into (see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL)). A contract is frustrated when subsequent to its formation, a change of

I circumstances renders the contract legally or physically impossible to be performed (see Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd Ed, 1987) at p 519).

[23] Lord Radcliffe said in his speech in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) that frustration occurs whenever the law recognises that without the default of either party, a contractual obligation becomes incapable of being performed as the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. The Latin maxim *non haec in foedera veni* would apply, which literally means 'It was not this that I promised to do'. There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. Lord Reid questioned whether the contract which was made on its true construction, was wide enough to apply to the new situation: if it is not, then it is at an end (see *Chitty on Contracts — General Principles* (24th Ed) at p 658–659).

[24] This was enunciated by Abdul Hamid FJ (as he then was) in *Ramli bin Zakaria v Government of Malaysia* [1982] 2 MLJ 257 (FC) at pp 261 and 262. The doctrine of frustration was further elaborated about two years later by Salleh Abas CJ (Malaya) (as he then was) in *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256 (FC) at p 258 where His Lordship said:

> It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for.

[25] According to s 57 of the Contracts Act 1950, an agreement to do an act of impossibility is void and a contract to do an act which, after it is made, becomes impossible or unlawful and it was not induced by the promisor, becomes void when the act becomes impossible or unlawful.

57 Agreement to do impossible act

(1) An agreement to do an act impossible in itself is void.

(2) Contract to do act afterwards becoming impossible or unlawful.

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) Compensation for loss through non-performance of act known to be impossible or unlawful.

> Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

Gopal Sri Ram JCA (as he then was) explained the ambit of s 57 in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201 (CA) as follows:

> [7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

[26] Furthermore, when there is a machinery or a guideline where parties have earlier indicated their agreement (as in this case, the price of the timber products were agreed to be 'a price consistent with the prevailing market price') and if there is a difficulty in arriving to the agreed terms, the court can apply any method in interpreting and substitute its own machinery. The court is under obligation to interpret a contract according to what is pleaded. Parties are under a duty to assist the court. In *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444 (HL), the House of Lords held that since the price was capable of being ascertained by a machinery, and if the machinery broke down for any reason, the court would substitute its own machinery, to ascertain a fair and reasonable price. Lord Diplock, in his speech, said:

> The only thing that has prevented the machinery provided by the option clause for ascertaining the fair and reasonable price from operating is the lessor's own breach of contract in refusing to appoint their valuer. So if the synallagmatic contract created by the exercise of the option was allowed to be treated by the lessors as frustrated the frustration would be self-induced, a circumstance which English law does not allow a party to a contract to rely on to his own advantage. So I see no reason why, because they have broken one contractual obligation the lessors should not be ordered by the court to perform another contractual obligation on their part

namely to convey the fee simple in the premises to the lessees against payment of a fair and reasonable price assessed by applying the objective standards to which I have referred.

[27] According to the facts of this case, the parties had provided for a mechanism (or guideline) to determine the price, viz, 'a price consistent with the prevailing market price'. The learned trial judge was correct in holding that the plaintiffs' claim was premature as the parties were bound by the agreement which they could have performed albeit with some difficulty. The Court of Appeal was therefore wrong in holding that the difficulty in interpreting the terms of an agreement amounted to frustration. It cannot be so because the agreement clearly expresses the intention between the parties to the agreement which is to determine the price, namely, 'a price consistent with the prevailing market price'. The agreement is not frustrated as there is no impossibility of interpreting their intentions. It may be difficult, but not impossible or incapable.

[28] Therefore, the answer to the second question is also in the negative.

[29] The defendant's appeal is allowed with costs here and below. Deposit to be returned to the defendants.

[30] My learned brothers Hashim Dato' Hj Yusoff FCJ and Mohd Ghazali Mohd Yusoff FCJ have seen this judgment in draft and expressed their agreement with it.

Appeal allowed with costs here and below.

Reported by Andrew Christopher Simon